No. 10,380

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARSON AND TAHOE LUMBER AND FLUMING CO. (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision of The Tax Court of the United States (formerly the United States Board of Tax Appeals) in which a deficiency in income tax was determined against Petitioner for the year 1938. The findings of fact and opinion below were rendered in memorandum form and are set forth in full in the record herein (R. 25-38).

Petitioner is a Nevada corporation and has its principal place of business in Carson City, Nevada (R. 5). Petitioner's income tax return for the year 1938 was duly filed with the Collector of Internal Revenue for the District of Nevada (R. 26). Respondent determined a deficiency in Petitioner's income tax for the

year 1938 in the amount of $4844.10 and on April 11, 1940, pursuant to Section 272 of the Internal Revenue Code, Respondent sent to Petitioner a notice of said deficiency (R. 11). On July 8, 1940, pursuant to Section 272 of the Internal Revenue Code, Petitioner filed its appeal from said deficiency determination and alleged therein that it had overpaid its income taxes for the year 1938 by the amount of $1254.45 (R. 5-15). On August 19, 1940, Respondent filed his answer to said petition denying the claims of Petitioner (R. 15-17). On March 17, 1941 Respondent filed an amended answer claiming an increased deficiency in income taxes for the year 1938 in amount of $17,963.61 (R. 17-22). On April 14, 1941 Petitioner filed its reply to amended answer denying the allegations in the amended answer (R. 22-25). The appeal was called for hearing on June 25, 1941 and evidence documentary and oral was introduced by both parties. On September 1, 1942 decision was entered determining a deficiency in Petitioner's income tax for the year 1938 in the amount of $15,488.61 (R. 38).

On November 27, 1942, under authority of Section 1141 of the Internal Revenue Code (Title 26, United States Code, Section 1141, as amended by Section 504 of the Revenue Act of 1942), Petitioner filed its petition for review by this Court of said decision of the Tax Court of the United States (R. 39). This appeal and the transcript of record herein were duly filed and docketed in this Court on March 3, 1943 (R. 358).

STATEMENT OF THE CASE.

The deficiency in income tax determined by Respondent which was the cause of this action resulted from an increase in gain reported by Petitioner from the sale of 11,187 acres of land in 1938. The additional gain determined by Respondent resulted from his determination that the property sold by Petitioner had a lesser fair market value on March 1, 1913 than the value as of that date used by Petitioner in computing its taxable gain from the sale. The issue presented to the Court below was the determination of the fair market value on March 1, 1913, of the property in question.

Petitioner was organized in 1873 and acquired many thousands of acres of land in Nevada and California on and near Lake Tahoe (R. 26). Petitioner carried on a lumber and milling business until 1896 when most of its merchantable timber had been removed and its lumbering operations were discontinued (R. 27). Thereafter to and including 1938 Petitioner was engaged primarily in disposing of its lands.

In 1938 Petitioner sold 11,187 acres of land in Douglas County, Nevada and on or near the eastern shore of Lake Tahoe. Said land and the improvements thereon were sold for $300,433.27. Petitioner had owned the land sold before March 1, 1913. Petitioner reported said sale in its income tax return for 1938 and reported a gain of $114,991.02. In computing said gain Petitioner reported a fair market value as of March 1, 1913 of the property sold in the amount

of $185,442.25. Said $185,442.25 included improvements at a cost or value of $30,428.25 and land at $155,014.00. There has been no dispute with regard to the cost or value of the improvements (R. 26).

Upon auditing Petitioner's return Respondent reduced the March 1, 1913 value of the land by $15,501.85 and increased the gain by a like amount (R. 26). As the result of said adjustment and others not here in controversy Respondent determined a deficiency for the year 1938 of $4844.10 (R. 12).

In its petition for the redetermination of said deficiency Petitioner alleged that the March 1, 1913 value of the land sold in 1938 was $192,217.36 and alleged that it had overpaid its income tax for the year 1938 by the amount of $1254.45 (R. 10).

In his amended answer, which was filed shortly before the hearing below, Respondent alleged that the March 1, 1913 value of the land sold by Petitioner in 1938 was not in excess of $60,000.00 and asked for a determination of an increased deficiency in tax in the amount of $17,963.61 (R. 21, 22).

The land in question consisted of 11,187 acres situated in Douglas County, Nevada on or near the southeastern shore of Lake Tahoe. Maps and other exhibits introduced in evidence show the location of the land by township, range and section and also show that the land included considerable lake frontage and extended back from the lake approximately 3 miles in most places and in one place approximately 5 miles (Petitioner's Exhibit 17).

The testimony of witnesses who were familiar with the land established that it included at least one harbor, sandy beaches, rocky banks, precipitous cliffs, meadow lands, grazing lands, timber lands which had been cut over but had second growth timber. The evidence shows that the land involved included considerable shore frontage but the record contains no evidence from which it can be determined how much of the shore frontage is sandy beach, how much is rock or how much is precipitous. Neither is there any evidence in the record with regard to the contour of the back land. There is no evidence in the record from which it can be determined how many acres can be considered as water front land, how many acres can be considered as meadow or grazing land, or how many acres can be considered as timber land.

Both parties called witnesses and introduced documentary evidence. Petitioner's witness W. S. Bliss testified that in 1912 he appraised all the land of Petitioner (44,000 acres), including the land in question, and the values placed upon the land in 1912 were put in evidence (R. 77). Both parties introduced evidence of sales and appraisals of land in the vicinity of Lake Tahoe over the period from 1901 to 1936. Sales prices varied from $1.25 per acre to $1500.00 per acre (R. 30-31).

In its findings of fact the Tax Court reviewed and summarized the evidence and listed certain of the sales and appraisals established by the evidence (R. 26-36). The Tax Court then stated at the conclusion of its findings,

> "The fair market value of the 11,187 acres of land here in question, as of March 1, 1913, exclusive of improvements, was $75,000." (R. 36.)

The Tax Court gave no indication in either its findings or its opinion with regard to how the value of $75,000.00 was determined.

On the basis of its finding that the March 1, 1913 fair market value of the land sold was $75,000.00 the Court entered its decision determining a deficiency in income tax for the year 1938 in the amount of $15,488.61.

This appeal is from said decision.

SUMMARY OF ARGUMENT AND CONTENTIONS.

In support of its appeal, Petitioner contends:

(1) There is nothing in the findings of fact or opinion of the Tax Court which supports a determination of a March 1, 1913 value of $75,000.00 for the property sold by Petitioner in 1938.

(2) The March 1, 1913 value found by the Tax Court is not supported by any evidence and is purely arbitrary.

(3) The evidence establishes the March 1, 1913 value used by Petitioner in its income tax return.

(4) Since in his amended answer, Respondent repudiated the value determined in the deficiency notice and undertook to establish a lesser value he thereby assumed the burden of proof to establish the March

1, 1913 value of the property sold and the taxable gain realized by Petitioner.

(5) Respondent failed to prove the value of the property on March 1, 1913 and did not produce any evidence from which a fair market value for the property could be determined.

(a) Not one of Respondent's witnesses expressed an opinion with regard to the March 1, 1913 value of the property in question.

(b) There was no description of the land involved or of other lands sold from which the Tax Court could make a comparison and determine the value of the land.

(6) As Respondent repudiated the deficiency notice and the value used therein and failed to prove any other value, there is nothing in the record from which the Tax Court could determine *any deficiency* in tax.

(7) In any event there was no evidence in the record from which the Tax Court could determine a deficiency greater than that set forth in the deficiency notice.

(8) The finding of value by the Tax Court was purely arbitrary, is not based upon or supported by any evidence and is erroneous as a matter of law.

SPECIFICATIONS OF ERROR.

In making and rendering its decision, as aforesaid, The Tax Court of the United States committed the following errors upon which your Petitioner relies as a basis for this proceeding:

The Tax Court of the United States erred:

(1) In determining a deficiency in Petitioner's income tax for the calendar year 1938 in the amount of $15,488.61.

(2) In failing to determine that there was no deficiency in income tax due from Petitioner for the year 1938 and that the Petitioner had overpaid its Federal income tax for 1938 by the sum of at least $1254.75.

(3) In finding that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by Petitioner in 1938 was $75,000.00, in that said finding is not supported by any evidence and is contrary to the only competent evidence of value in the record.

(4) In failing to find that the fair market value as of March 1, 1913 of the 11,187 acres of land sold by Petitioner in 1938 was not less than $155,014.00 as reported by Petitioner in its income tax return for 1938 as the only competent evidence of value in the record requires such finding.

(5) In finding that the acreage aforesaid had a fair market value of $75,000.00 as of March 1, 1913 without setting forth any reasons for determining such a value of $75,000.00 or showing by any computation, data or detail how such a figure was reached

or determined. The said valuation of $75,000.00 as found by the Tax Court was not in accord with the determination of Respondent in his notice of deficiency, nor with the figure claimed by Respondent in his amended answer, nor with the March 1, 1913 value as shown by Petitioner in its 1938 return, nor with the value claimed by Petitioner before the Tax Court.

(6) In any event, the Tax Court erred by finding a lower value as of March 1, 1913 for the said acreage than the value of $139,512.15 determined by Respondent in his notice of deficiency dated April 11, 1940. There was no evidence adduced at the trial which would substantiate a fair market value as of March 1, 1913 of less than $139,512.15 for the said acreage as found by the Respondent in the notice of deficiency upon which his *prima facie* case was based.

(7) In failing to make a complete and sufficient findings of fact showing how the figure of $75,000.00 was determined to be the fair market value as of March 1, 1913 of the acreage sold in 1938.

(8) In disregarding the unrebutted evidence of Petitioner and reaching an independent conclusion of its own that the acreage in question had a fair market value of $75,000.00 on March 1, 1913.

(9) In not redetermining the deficiencies in favor of Petitioner and against the Respondent.

ARGUMENT.

I. INTRODUCTORY STATEMENT.

The controversy between the parties hereto concerns the amount of the taxable gain realized by Petitioner upon the sale in 1938 of 11,187 acres of its property and the improvements thereon. Under the law (Revenue Act of 1938, Section 111) the taxable gain was the excess of the amount realized over the adjusted basis as provided in Section 113 of the Revenue Act of 1938. As the property in question was acquired prior to 1913 the basis to be used in computing the gain was the cost or the fair market value of the property as of March 1, 1913 whichever was higher (Revenue Act of 1938, Section 113(a)(14)).

Since the parties were in agreement with regard to the price ($300,433.27) received by Petitioner upon the sale of its property in 1938 and with regard to the cost basis of the improvements sold ($30,428.25) (R. 19), and since it was not contended that the cost of the land to Petitioner exceeded the fair market value thereof on March 1, 1913 the only issue presented to the Tax Court was the March 1, 1913 value of the land sold (R. 26).

In its income tax return for the year 1938 Petitioner reported a March 1, 1913 value for the land of $155,014.00 and a taxable gain on the sale of $114,991.02 (R. 26). In determining the deficiency which gave rise to this action Respondent determined that the fair market value of the land on March 1, 1913 was $139,512.15 and that the taxable gain realized was $130,492.87 (R. 14). In its petition to the Tax Court

Petitioner alleged that the March 1, 1913 fair market value of the land was $192,217.36 (R. 10). In his amended answer Respondent alleged that the March 1, 1913 fair market value of the land was $60,000.00, and that the taxable gain realized was $210,005.02 instead of $130,492.87 shown in the deficiency notice (R. 21). The Tax Court found that the March 1, 1913 fair market value of the land was $75,000.00 (R. 36). On the basis of the value found the Tax Court rendered and entered its decision for an increased deficiency in tax.

Petitioner's contention in this appeal is that the March 1, 1913 value found by the Tax Court is not supported by substantial evidence and is purely arbitrary and contrary to the evidence herein. Petitioner further contends that the evidence conclusively supports the value used by Petitioner in its income tax return, that Respondent had the burden of proof and failed to prove the March 1, 1913 value of the property and that therefore there was no evidence or basis upon which the Tax Court could determine either an increased deficiency or any deficiency at all on this issue.

(a) Finding of value must be supported by substantial evidence.

While the question of value is an issue of fact and a finding of value by a trial Court will not be reviewed by an Appellate Court to determine whether the finding is supported by the weight of evidence, it is well settled that whether a finding of value is supported by substantial evidence is a question of law

which will be reviewed by an Appellate Court. This Court and other Courts of appeal have many times reversed the decisions of the Board of Tax Appeals and District Courts where it appeared that the lower Court made a finding of value which was not supported by substantial evidence.

Helvering v. Rankin (1935), 295 U.S. 123, 55 S. Ct. 732;

Belridge Oil Company v. Commissioner (9 Cir. 1936), 85 F. (2d) 762;

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518; affirmed 300 U.S. 481;

Buena Vista Land & Development Co. v. Lucas (9 Cir. 1930), 41 F. (2d) 131;

Citrus Soap Company of California v. Lucas (9 Cir. 1930), 42 F. (2d) 372;

Royal Packing Company v. Commissioner (9 Cir. 1927), 22 F. (2d) 536;

Toledo Grain & Milling Co. v. Commissioner (6 Cir. 1932), 62 F. (2d) 171;

Helvering v. Kendrick Coal & Dock Company (8 Cir. 1934), 72 F. (2d) 330;

Nachod & U. S. Signal Co. v. Helvering (6 Cir. 1934), 74 F. (2d) 164;

Planters Operating Company v. Commissioner (8 Cir. 1932), 55 F. (2d) 583;

Boggs and Buhl v. Commissioner (3 Cir. 1929), 34 F. (2d) 859;

Chicago Railway Equipment Co. v. Blair (7 Cir. 1927), 20 F. (2d) 10;

Washburn v. Commissioner (8 Cir. 1931), 51 F. (2d) 949;

Dempster etc. Company v. Burnet (Ct. App. D. C.), 46 F. (2d) 604;

Conrad and Company v. Commissioner (1 Cir. 1931), 50 F. (2d) 576;

Pittsburgh Hotels Company v. Commissioner (3 Cir. 1930), 43 F. (2d) 345.

The above decisions establish the principle that a finding of fact such as value will not be disturbed on appeal if it is supported by substantial evidence but such finding must be based upon the evidence in the case and must not be arbitrary and unreasonable. While a finding of value is in most cases necessarily a "guess", it cannot be an arbitrary guess. It must be a reasonable guess which finds support in the evidence.

Andrews v. Commissioner (2 Cir. 1943), 135 F. (2d) 314.

(b) Burden of proof was on respondent.

Unlike most tax cases in which the burden of proof rests with the taxpayer, in the present case, the burden of proof was on the Respondent. In his amended answer Respondent repudiated and abandoned the March 1, 1913 value determined in the deficiency notice and alleged and undertook to establish a much lower value than had been used in determining the deficiency assessment. In so doing the Respondent assumed the burden of proof with regard to March 1, 1913 value and the amount of taxable gain realized by Petitioner upon the sale of its property.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518;

Hull v. Commissioner (4 Cir. 1937), 87 F. (2d) 260;

Rule 32, Rules of Practice before the United States Board of Tax Appeals;

Henderson Tire & Rubber Co. v. Commissioner, 12 B.T.A. 716.

The value found by the Tax Court herein is considerably less than the value used by Petitioner in its return and the value used by Respondent in the deficiency notice, and is greater than the value alleged by Respondent in his amended answer. The value found by the Tax Court must therefore find its support solely in the evidence and can derive no support or benefit from the ordinary presumption of correctness which attaches to the determination of the Commissioner.

II. ANALYSIS OF FINDINGS AND OPINION OF TAX COURT.

In its findings of fact the Tax Court summarized a substantial portion of the evidence, but it made no finding and set forth no evidence which would indicate or support the $75,000.00 value found by the Court.

After stating the various values claimed by the parties and briefly summarizing the history of Petitioner and its property holdings, the Court made certain findings with regard to the physical conditions which prevailed on the Nevada side of Lake Tahoe in 1912 and 1913 (R. 27). The Court found that the Nevada side of Lake Tahoe was not as desirable for recreational purposes as the California side and that in 1916 waterfront property on the California side

was selling for five to ten times as much as that on the east side of the lake (R. 28). The Court found that in 1912 Petitioner gave an option for the purchase of 44,403 acres of land for $778,500.00 which option was to run for five years under certain conditions. The option was cancelled in 1913 because no purchase had been made (R. 28-29). The prices named in the option were those that Petitioner's president, W. S. Bliss, felt would be realized over a period of five years from 1912. There was a financial depression in 1913 and there was little demand for Petitioner's property from 1913 to 1920 (R. 29).

The Tax Court set forth a list of sales of property on the east side of Lake Tahoe from 1903 to 1923 and the prices paid, which prices varied from $1.25 per acre to $1500.00 per acre (R. 30). The Court set forth the appraisals in 1910 and 1921 of properties in the Estate of Duane Leroy Bliss and Elizabeth T. Bliss (R. 31).

The Court discussed the capital stock tax and income tax returns of Petitioner for several different years which declared values for the lands and the stock of Petitioner which, when converted to an acreage basis, showed values per acre of $1.35 to $3.00 (R. 32-33).

The Court pointed out that on January 29, 1918, the trustees of Petitioner by resolution fixed the March 1, 1913 values of all its property (44,000 acres) at $260,000.00 (R. 34-35).

The Court discussed the assessed values of Petitioner's property which were used for county tax pur-

poses (R. 35). In 1935 Frank Murphy, a trustee and vice-president of Petitioner, offered to the United States Forestry Service the back lands in Douglas County, Nevada for $3.00 per acre, and the shore lands exclusive of Zephyr Cove for $10.00 per acre. In 1938 the Forestry Service, having checked the lands offered, purchased 2240 acres of back lands owned by Petitioner in California, south of the lake for $3.00 per acre (R. 36).

Having stated the above facts and without analysis or discussion, the Court then stated: "The fair market value of the 11,187 acres of land here in question, as of March 1, 1913, exclusive of improvements was $75,000.00" (R. 36).

In its opinion the Court merely stated that it had considered all the evidence but had derived little help from sales on the California side of the lake or from sales more than ten years before or more than ten years after 1913 (R. 37).

Petitioner submits that there is absolutely nothing in the findings or the opinion of the Court which gives any support to the finding that the March 1, 1913 fair market value of the 11,187 acres was $75,000.00. The Tax Court gives no inkling of the method or formula which it used to reach the value determined. The value found does not approximate any value claimed by either of the parties. No witness testified to any such value. Reduced to an acreage value the value found equals an average value of approximately $6.70 per acre. There were six sales at prices varying between $4.28 per acre and $10.00 per acre but the

findings show that the locations of three of the six properties sold was unknown and the other three were from one-half mile to one and three-quarter miles from the lake (R. 30). During the same period there were three sales at $500, $764.59 and $1500.00 per acre (R. 30). The findings indicate that the shore land was more valuable than the back land (R. 28), but there is nothing in the findings or opinion to indicate that the Court made any distinction between shore land and back land. There is nothing in the findings or opinion to indicate that the Court employed any method to reach the value found. A value of $25,000.00 or $200,000.00 would find as much support in the findings and opinion as $75,000.00.

In this connection it should be noted that the Court had under consideration 11,187 acres of land which the record shows included various classes of land varying from sandy beach land to precipitous cliffs and mountain lands several miles from the lake. The findings do not state what portion of the land was considered as shoreland and what portion was considered back land. The sales listed in the findings were made from 1903 to 1923 and varied in size from 2 acres to 1634 acres. Many of the sales were of unknown location. The shore front sales varied from $1.25 an acre to $1500.00 an acre. It is obvious that all of said sales cannot be considered sales of comparable lands. The Court gives no indication with regard to which of the sales were considered comparable or which of the sales, if any, were considered in reaching the value of $75,000.00. It would take a

nebulous formula indeed to determine the value of the lands in question from the sales listed. The Tax Court is required to state the evidence or facts upon which it bases its finding of value.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518.

Petitioner respectfully submits that the value of $75,000.00 determined by the Court was purely arbitrary and is not supported by any of the facts stated in the findings.

III. THE VALUE FOUND BY THE TAX COURT IS NOT SUPPORTED BY ANY EVIDENCE.

(a) Summary of evidence.

The evidence in this case both oral and documentary is voluminous and much of it seems rather far afield from the issue involved. Petitioner will attempt to summarize as briefly as possible the portions of the evidence which it believes might be considered pertinent.

Testimony of W. S. Bliss.

Mr. Bliss, who was called as a witness by Petitioner, was 76 years of age and had spent almost all of his life around Lake Tahoe. He was educated in civil and mining engineering and was a licensed real estate operator (R. 50-51). In 1907 Mr. Bliss succeeded his father as manager of Petitioner. In 1910 he became president and held that position until 1928 (R. 51). He did logging and engineering for Petitioner and built the Truckee and Tahoe Railroad (R. 53).

He was unquestionably familiar with the lands of Petitioner and with land in general in the vicinity of Tahoe.

In April 1912 Bliss and Petitioner entered into a contract whereby Bliss was authorized to sell the property of Petitioner (Petitioner's Ex. 6, R. 67). At the same time an option to be exercised over a period of five years was granted by Petitioner through Bliss to Brewster, Edwards and Wooster, a real estate firm in San Francisco, for the purchase of Petitioner's property (44,403 acres) for a total price of $778,500.00 (Petitioner's Ex. 7, R. 76). The land was classified into blocks and a price was fixed for each block (R. 77). Petitioner's Exhibit 8 shows the location of the various blocks.

Bliss testified that he went over the land in 1912 and fixed the values set forth in the option agreement (R. 61). The values fixed were the prices for which Bliss thought the property could be sold over a period of five years (R. 62). He spent considerable time making the appraisal and considered the appraisal correct at the time it was made (R. 107-108). The purpose of the appraisal was to determine the minimum amount for which the land could be sold (R. 62).

No property was sold under this option. At the expiration of the first year Mr. Wooster asked for an extension stating as his reason for his failure to sell the property that it was a presidential year which caused a general financial depression and conservatism in business (R. 84). The option was extended for one month and then cancelled (R. 87).

Mr. Bliss testified with regard to several sales of property which he had appraised (R. 112-117). He also testified that he had a disagreement with the other trustees of Petitioner, particularly Mr. Murphy, with regard to the prices for which Petitioner's properties should be sold. The disagreement culminated in a lawsuit which was settled by Bliss surrendering his interest in the company for certain property (R. 119-120).

On cross-examination Bliss testified that he valued the land by putting a certain value on the shore per foot, a certain value on acres for building sites and a lower value on back land and that the prices fixed were what he thought the property could be sold for (R. 127-128). No attempt will be made to summarize the remainder of the cross-examination of Mr. Bliss (R. 126-171) as it is difficult to determine what portions thereof are pertinent and summarization might distort the purport of the testimony.

On redirect examination Bliss testified that in 1912 the property was covered with a wonderful growth of second growth timber, some of which was fifty years old (R. 172), and that land with second growth timber was much more valuable than cut-over land (R. 172).

Testimony of Mr. Harry O. Comstock.

Mr. Comstock, who was called as a witness by Petitioner, was 67 years old and had lived most of his life at Lake Tahoe. He owned the Hotel Brockway at the north end of the lake and had been in the hotel business at the lake for many years (R. 177). He

and his father had operated a hotel at Tallac on the south end of the lake for 36 years (R. 178). He had also known Mr. Bliss most of his life. He had dealt extensively in real estate and testified with regard to a number of sales and purchases which he had made on and around Lake Tahoe (R. 178-188).

His testimony showed that he was familiar with most of the land owned by Petitioner and he testified that in his opinion the 1912 appraisal of Bliss was very conservative at the time it was made (R. 199).

On cross-examination he testified that the Nevada lands which he purchased or sold were all near the California line and that except for two acres he never owned any property in Douglas County, Nevada (R. 214-215). His valuation of land on the Nevada side of Lake Tahoe was based upon what he thought it ought to be in view of what happened in California (R. 219). In his opinion the Nevada side of the lake was just as desirable as the California side (R. 215). The earlier development of the California side of the lake was not due to better accessibility but rather that that side just happened to be developed first (R. 193).

Testimony of Arnold M. Weber.

Captain Weber, who was formerly an associate forester in the El Dorado Forest, carried on negotiations in 1935 for the purchase of land from Petitioner; 7790 acres in California south of Lake Tahoe were purchased *in 1938* for $3 per acre (R. 206). (This land was four or five miles from the lake (R. 332).) Mr. Murphy, vice-president of Petitioner, offered all the land of Petitioner except Zephyr Cove

for $3.00 per acre for back land and $10 per acre for shore land (R. 208). Weber considered the land purchased more desirable than the other land offered (R. 209).

Weber did not consider himself competent to judge land prior to 1926 (R. 211).

Testimony of Joseph W. Hall.

Mr. Hall testified to certain purchases and sales which he made on the Nevada side of Lake Tahoe in 1901 and 1903 and in the 1920's (R. 249-253). He testified that there wasn't much activity in real estate until the 1920's (R. 254). He had known the Nevada side of Lake Tahoe since 1901 but had been in the real estate business only since 1920 (R. 249).

Testimony of William D. Park.

Mr. Park, the sheriff and assessor of Douglas County, Nevada, testified from the county records that the lands of Petitioner in Douglas County were assessed at $1.25 per acre in 1912 without classification (R. 281-282). Mr. Park became assessor in 1923 (R. 283). He had been a blacksmith prior to 1923 (R. 287), and did not know anything about land at Tahoe (R. 283). After Park became assessor he classified property and increased the assessed values (R. 283-284). Park had no real estate experience but was helped by a Mr. Fulstone who was not called as a witness and whose knowledge of real estate values does not appear in the evidence (R. 286). The assessed value of Petitioner's land in 1937 was approximately double the assessed value in 1913 (R. 293).

Testimony of Millard McKinley Barnum.

Mr. Barnum was a senior forester of the Forest Service and testified with regard to land purchases in the Tahoe region by the Forest Service (R. 320-328). He went to Tahoe for the first time *in 1923* (R. 317). The land which was purchased from Petitioner in 1938 was 4 or 5 miles from the lake (R. 332), but was good ground and better for grazing than the offered land which was not purchased (R. 333). The purpose of the purchase was for reforestation (R. 334).

Testimony of Louis A. Barrett.

Mr. Barrett was assistant regional forester. He first went to Tahoe in 1911 and made several trips thereafter. In 1915 he made a trip there to look for recreational land. He gave no consideration to the Nevada side of the lake because of poor accessibility, less favorable climatic conditions and the lands had been logged over (R. 343-344). He stated that land on the California side of the lake sold for five to ten times as much as that on the Nevada side and that in 1916 some of the land on the California side couldn't be had for less than $500.00 to $1000.00 per acre (R. 344-345).

In 1925 he spent a few hours hiking along the summit on the east side of the lake back of Glenbrook and Zephyr Cove with a view to determining what he would consider a fair price to pay if the land was offered to the United States (R. 345-346). He decided that if the land could be acquired for $1.25 per acre it would be a desirable acquisition from the standpoint

of the United States (R. 346). The land he so classified was from a quarter of a mile to a half mile or more back from the lake (R. 346).

Testimony of Mrs. Fred Allerman.

Mrs. Allerman testified that she was born in Glenbrook, Nevada and had spent most of her life around Tahoe (R. 264). Her father had owned Marley Ranch which was about a mile south of Zephyr Cove on the lake front. There were 152 to 160 acres in the ranch (R. 266). In 1911 her father bought the property adjoining the ranch known as Round Mountain for $200 (R. 268). She didn't know how many acres were in the Round Mountain property but that property and the Marley Ranch took in all the lake frontage of Marla Bay (R. 267-268).

Testimony of Joseph Allen McFaul.

Mr. McFaul had lived at Tahoe most of his life and worked at cutting cord wood (R. 269-271). He was at Marla Bay until 1913 and remembered that the roads were just ordinary dirt roads (R. 272).

Testimony of Hans R. Jepsen.

Mr. Jepsen was county clerk and treasurer of Douglas County, Nevada and had been for 19 years (R. 273). He produced the probate records of the Estate of Duane Leroy Bliss, deceased, and Elizabeth T. Bliss, deceased. He made the appraisal in the Estate of Elizabeth T. Bliss in 1921 (R. 276). He had worked for the Forest Service before he became county clerk in 1923 and had handled the collection of grazing

fees (R. 229). He had no definite knowledge of sales of land and wasn't interested in any sales (R. 279).

Testimony of William H. Smith.

Mr. Smith was associate highway engineer for the United States and had charge of the improvements on the Nevada side of Lake Tahoe *from 1929 to 1935* (R. 305). He described the condition of the roads in 1930 and testified with regard to traffic counts which were made from 1931 to 1940 (R. 306-309).

Mr. John T. Boyle identified certain records which showed a sale of land by a Mrs. Beatty *in 1921* (R. 258).

Mr. James B. Howell was the representative of Mr. Whittell, who purchased Petitioner's land in 1938. He testified that he dealt with Mr. Murphy and with Mr. McLeod and that Whittell also purchased the property known as Skyland for $60,000.00 in 1938 (R. 259-263).

Mr. C. C. Griggs, a technical advisor with the Bureau of Internal Revenue, testified that he had prepared one of the maps (Respondent's Ex. L) which was put in evidence and that he had taken certain photographs, shortly before trial, which were put in evidence. He also testified with regard to the present condition of the timber on a certain section of land (R. 299).

There was other evidence in the form of exhibits including maps, tax returns, and minutes of meetings of Petitioner's trustees and stockholders, but none of the documentary evidence affirmatively establishes the

value of the 11,187 acres of land here in question. Most of the documentary evidence was introduced as a basis for testimony of witnesses.

The above is not intended to be a comprehensive summary of all of the evidence. It is merely a summary of the portions of the testimony which Petitioner believes might be considered pertinent. Much of the evidence is too indefinite to summarize and a great deal of the evidence is so remote that it seems to have little, if any, bearing upon the March 1, 1913 value of the property involved. If Petitioner has omitted any material evidence Respondent will no doubt call such evidence to the attention of the Court.

(b) Analysis of the evidence.

Before considering the evidence introduced Petitioner desires to call attention again to the fact that the issue before the Tax Court was the determination of the fair market value as of March 1, 1913 of 11,187 acres of land on and near Lake Tahoe. Maps were introduced which showed the location of the land in question by township, range and section. Maps also show the location of other properties sold (Exhibits 8, 17, 18, K and L). The maps also show that the land included considerable lake frontage and extended back several miles from the lake. The evidence discloses that the lake frontage included at least one harbor, sandy beaches, rocky beaches and precipitous cliffs and that the land which could be considered as shore land varied in depth from a quarter of a mile to more than a half mile. There is no evidence in the

record which shows what portions of the land could be properly included in any of the above classifications.

The evidence also discloses that most of the land had been cut over but was covered with second growth timber varying in age up to fifty years. The property also included meadows and grazing land. There is no evidence in the record from which the back land can be properly classified.

It is also clear from the record that shore frontage varied in value depending upon its character as between harbor, sandy beach, rocky beach and precipitous cliffs. The value of back land also varied in accordance to its contour, the timber growth, suitability for grazing and proximity to the lake.

Petitioner submits that it would be impossible for anyone to place anything but an arbitrary value upon 11,187 acres of land which included so many different types and classifications of property of widely varying values without knowing at least approximately how many acres should be included in the various classifications. There is nothing in the record which indicates that the Judge of the Tax Court had any independent knowledge of the property involved and statements made during the trial indicate that he was not familiar with the property or the general vicinity of the property. As there was no evidence in the record from which the property could be classified it is submitted that the value determined by the Tax Court was necessarily an arbitrary value. It is to be noted that while all of the witnesses who knew the land and

had any qualifications whatsoever considered the land as including several different types of property of widely varying values, the Tax Court in its findings and opinion made no attempt to classify the property but merely found that the entire property had a fair market value in 1913 of $75,000.00.

Neither was the finding of value based upon the opinion of any qualified expert for the only witnesses who expressed opinions with regard to 1913 value of the property were W. S. Bliss and Harry O. Comstock. Respondent's witnesses testified to sales and appraisals of various parcels of land on and around the lake but not one of them expressed an opinion with regard to the fair market value of the land in question as of March 1, 1913 or any other date. The nearest approach to an opinion by any of Respondent's witnesses was the statement of the witnesses in the Forestry Service that in *1935 or 1938* they considered the land which they purchased from Petitioner for $3.00 per acre more valuable for their purposes, namely, reforestation, than the portion of the land involved which was offered to them by Mr. Murphy. The offer referred to admittedly did not include Zephyr Cove, the most valuable portion of the property here in question. Mr. Barrett also testified that in 1925 he spent a few hours hiking over the property and determined that if the land could be acquired for $1.25 per acre it would be a desirable acquisition from the standpoint of the United States (R. 346). It is quite apparent that neither of the above statements was intended as an expression of opinion as to the value of the property in question in 1913.

It must also be obvious that since the Petitioner sold the remainder of its property, 11,187 acres, in 1938 for over $300,000.00, the $3.00 per acre price mentioned as the price paid *in 1938* for some of Petitioner's property could not possibly have been any indication of the value of the remaining 11,187 acres.

The sales of land which were shown by the evidence do not establish the value of Petitioner's land or furnish a basis for the determination of such value. The sales listed in the findings (R. 30) cover a period of twenty years and the sales not listed were even more remote. The prices paid varied from $1.25 per acre to $1500.00 per acre. No comparison was made between the lands sold and Petitioner's land.

Sales of comparable property are acceptable as evidence of value in most jurisdictions but it must appear that the other properties sold were comparable to that to be valued.

118 *A. L. R.* 869, 876;
20 *American Jurisprudence* 342;
Brand v. Commissioner, 5 B. T. A. 297.

The mere fact that the property is in the same general vicinity does not establish that the properties are comparable particularly where the vicinity includes many different classifications of land of widely varying value. Also in order to be entitled to consideration the sales of comparable properties should be near the valuation date. Furthermore, in the present case the prices at which the various sales were made covered such a broad range that no reasonable pattern or formula of value could be devised there-

from. It is respectfully submitted that the evidence in this case with regard to sales of other properties is too incomplete to furnish any basis for the valuation of the 11,187 acres in question.

The evidence also included appraisals made in 1910 and 1921, in connection with the administration of the estates of two decedents, of lands near Glenbrook, and Zephyr Cove. There is no evidence as to who made the appraisal in 1910 or the basis thereof. The testimony of Hans R. Jepsen, who made the appraisal in 1921, shows clearly that he had no real knowledge of land values and no qualifications to place a fair appraisal on land particularly in 1921 (R. 278-279). An appraisal, even in connection with the administration of an estate is nothing more than the opinion of the person who makes it. If the appraiser is not qualified or if he is unknown the appraisal is not entitled to any consideration.

The appraisals do not qualify as the opinion of an expert witness because there is nothing in the evidence which shows that the persons who made them were qualified to give an acceptable opinion. Even the approval thereof by the Probate Court would not make the appraisals acceptable as competent evidence of fair market value. *Carnrick v. Commissioner,* 21 B. T. A. 12. The appraisals have no apparent connection with the value found by the Tax Court and it is submitted that they cannot be considered as substantial evidence supporting the value found.

The evidence also shows that Petitioner made varying statements and representations in its income and

capital stock tax returns and in its books and minutes with regard to the average value per acre of its land and the total value of all its lands. The testimony of Mr. Bliss (R. 132-133), and Mr. Bigelow (R. 234) show that the values used were arbitrary and did not represent a fair appraisal of land values. Furthermore, there is no evidence to show what portion of the values declared should be allocated to the land here in question. Such evidence falls far short of the affirmative proof required to establish the fair market value of property.

See

Appeal of Kilburn Machine Co., 2 B. T. A. 363;
Appeal of Pennsylvania Match Co., 4 B. T. A. 944.

Again there is no apparent relation between the represented values in the returns and the values found by the Tax Court and it is submitted that such discredited representations could not constitute affirmative proof of land values.

There was also considerable testimony with regard to the condition of the roads and the accessibility of the property. The Tax Court found that the road was poor and that the property was not easily accessible (R. 27). That conclusion was apparently based primarily upon the testimony of Mr. Smith, who surveyed the property for the new road about 1930 (R. 305). Mr. Smith first went to Lake Tahoe in 1930 (R. 305), and it is apparent from his testimony that he was comparing the old road with roads as they are constructed today.

In this connection it should be noted that the witnesses who traveled the road in 1913 considered it to be a fair road at that time (Bliss (R. 162), Comstock (R. 218), McFaul (R. 272)). The road was used by the stage in the early days and later by automobiles. The road from Truckee to Tahoe City was no better than the road from Carson City to Tallac (R. 218-219).

IV. THE EVIDENCE SUPPORTS PETITIONER'S VALUATION.

As stated above, the only witnesses who were thoroughly familiar with the land in 1913 who expressed opinions with regard to the 1913 value of the 11,187 acres in question were W. S. Bliss and Harry O. Comstock. There can be no doubt with regard to their qualification as experts. The appraisal upon which the opinion of Mr. Bliss was based was made in 1912, shortly before the basic date and before the enactment of the income tax law. The appraisal was made after a thorough examination of the property in which consideration was given to the various types of land included and the effect of shore frontage, and was made for the purpose of determining the prices which could be realized for the property over a period of five years, a period which was certainly not unduly long for the sale of over 44,000 acres of land. The appraisal was used as the basis for an option granted to a real estate firm for the purchase of the property. While no purchases were made under the option the optionee was sufficiently interested to seek an extension. Financial depression and business conservatism

were given by the optionee as the reasons for his failure to make sales.

Mr. Comstock, who was also thoroughly familiar with land around Tahoe, including the land in question, long before 1913 and who made many purchases and sales of land around 1913, stated that the appraisal made by Mr. Bliss in 1912 was conservative at the time it was made (R. 199).

The appraisal made by Mr. Bliss and his testimony, corroborated by Mr. Comstock, is the only evidence in the record which definitely pertains to the March 1, 1913 value of the 11,187 acres in question. Mr. Bliss did not describe the land but the evidence shows that he knew the land and took into consideration the nature of the land and the effect of shore frontage in fixing the value which he placed thereon. Mr. Comstock's testimony also shows that he was thoroughly familiar with the land in question and with lands in general around Lake Tahoe (R. 198). He had been talking land with Mr. Bliss for 30 years. He had gone over the maps of Mr. Bliss in years past and had always considered that Mr. Bliss was most conservative in the values he placed on the land (R. 198).

Subsequent sales did not all bring the price at which Mr. Bliss had appraised the property but he explained that he was under pressure from the stockholders to raise money and the sale of land was his only means of raising money (R. 112).

The testimony of Mr. Bliss was not as definite in many respects as it might have been but it should be remembered that at the time of trial he was 76 years

of age and was being questioned about events which happened twenty and thirty years ago. The appraisal which he made was not retrospective but was actually made in 1912 in the light of conditions as they then existed.

No clear explanation was given with regard to the declarations and representations of value in the tax returns but here again it must be remembered that those returns were made when the income and capital stock tax laws were comparatively new and not well understood. Also, the returns were made during and shortly following war years when business and land values were still more or less disturbed from the war.

No other witness testified to a different value for the land in question except Comstock who gave higher values to some of the lands (R. 193-197), and there is no evidence in the record which establishes that the Bliss appraisal was not fairly and honestly made and entitled to consideration in determining the March 1, 1913 value of Petitioner's land.

It is apparent from the findings of the Tax Court that little or no consideration was given to the appraisal and opinion of Mr. Bliss. The rule is now well established by decisions of this Court and other Courts of Appeal that while the Tax Court is not necessarily bound by opinions of experts, expert testimony as to valuation of property cannot be disregarded by the Tax Court where there is no other evidence and the Court has no knowledge of its own with regard to the value of the property.

Belridge Oil Co. v. Commissioner (9 Cir. 1936), 85 F. (2d) 762;

Citrus Soap Co. v. Lucas (9 Cir. 1930), 42 F. (2d) 372;

Boggs & Buhl, Inc. v. Commissioner (3 Cir. 1929), 34 F. (2d) 859;

Planters Operating Co. v. Commissioner (8 Cir. 1932), 55 F. (2d) 583;

Chicago Railway Equip. Co. v. Blair (7 Cir. 1927), 20 F. (2d) 10;

Bryant, et al. v. Commissioner (2 Cir. 1935), 76 F. (2d) 103;

Tex-Penn Oil Co. v. Commisioner (3 Cir. 1936), 83 F. (2d) 518.

It is respectfully submitted that as the value fixed by Mr. Bliss and corroborated by Mr. Comstock was the only evidence before the Tax Court with regard to the March 1, 1913 value of the land in question, and as there is no evidence in the record to support any other value, it was reversible error for the Court to refuse to accept the appraisal of Mr. Bliss as establishing the value of the land.

V. THE TAX COURT ERRED AS A MATTER OF LAW IN FINDING A MARCH 1, 1913 VALUE LESS THAN THE VALUE ESTABLISHED BY THE APPRAISAL OF MR. BLISS.

As stated above, Petitioner believes that it established that the March 1, 1913 value of its property was at least as great as the value used in its income tax return. But even assuming that the Tax Court was justified in concluding otherwise, there was still no basis, evidence or authority upon which the Court could justify a value other than that established by the

appraisal of Mr. Bliss and claimed by the Petitioner in its tax return.

If the appraisal and opinion of Mr. Bliss and the testimony of Mr. Comstock are disregarded, there is then no evidence whatsoever in the entire record upon which a finding of a value as of March 1, 1913 for the 11,187 acres of land in question could be based. No other witness expressed an opinion with regard to the value of said land as of 1913 or any other date. There is no evidence in the record from which a comparison can be made between the other lands sold and the 11,187 acres to be valued. There is nothing in the record to indicate that the judge of the Tax Court had any knowledge upon which he could base an independent finding of value. The Tax Court has no authority to make an arbitrary finding of value not supported by any evidence.

The Tax Court is a fact finding body and is required to find the facts of the case when competent evidence is presented upon which a finding can be based. But the Court is not required or permitted to find facts which are not supported by the evidence.

Belridge Oil Co. v. Commissioner (9 Cir. 1936), 85 F. (2d) 762;

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518;

Andrews v. Commissioner (2 Cir. 1943), 135 F. (2d) 314.

When the parties fail to produce evidence from which a finding can be made and the Tax Court has no independent knowledge upon which it can base a

finding, any finding of fact would necessarily be arbitrary and unreasonable and beyond the power of the Court.

The findings of fact and opinion of the Tax Court in this case clearly show that the finding of a value of $75,000.00 was wholly arbitrary. The Court points to no evidence and sets forth no method of reasoning as being relied upon or followed or which could have been relied upon or followed to determine the value found. The mere statement in the opinion that all the evidence was considered does not make the finding any the less arbitrary especially since there is no evidence in the record which supports such a value. This failure of the Court to set forth the evidence or other basis upon which it determined the value found is in itself sufficient grounds for reversal of the decision.

Tex-Penn Oil Co. v. Commissioner (3 Cir. 1936), 83 F. (2d) 518;

Andrews v. Commissioner (2 Cir. 1943), 135 F. (2d) 314.

It is respectfully submitted that the finding of a value of $75,000.00 for Petitioner's land as of March 1, 1913 was purely arbitrary and that there is no evidence in the record to support that finding or any other value except one based upon the appraisal of Mr. Bliss. If the Court was justified in refusing to accept the appraisal of Mr. Bliss it should have refused to make any finding of value for failure of proof.

VI. THE TAX COURT ERRED AS A MATTER OF LAW IN DETERMINING A DEFICIENCY GREATER THAN THAT SET FORTH IN THE DEFCIENCY NOTICE.

It is not the function of the Tax Court to assess additional taxes but to redetermine deficiencies proposed by the Commissioner (Internal Revenue Code, Section 272(a)(1)). The Tax Court has no power to determine an increased deficiency unless a claim is properly made therefor by the Commissioner (Internal Revenue Code, Section 272(e)). Furthermore, if an additional deficiency is affirmatively claimed by the Commissioner, he assumes the burden of proof and the Tax Court has no power to increase the deficiency unless the Commissioner establishes his claim by affirmative evidence.

Moise v. Burnet (9 Cir. 1931), 52 F. (2d) 1071;
Pittman v. Commissioner, 24 B. T. A. 244;
Monroe Sand & Gravel Co. v. Commissioner, 36 B. T. A. 747.

If the Commissioner fails to carry the burden of proof with regard to his claim for an increased deficiency by failing to establish his claim by affirmative evidence, the Tax Court has no authority to increase the deficiency originally proposed and a decision for a greater deficiency would be erroneous as matter of law. See:

Cascade Milling & Elevator Co. v. Commissioner, 25 B. T. A. 946;
Terminal Railroad Association v. Commissioner, 33 B. T. A. 906;
Commissioner v. Fifth Avenue Bank (3 Cir. 1936), 84 F. (2d) 787;

Rines Real Estate Co. v. Commissioner, 12 B. T. A. 1370;

Falck v. Commissioner, 26 B. T. A. 1359.

The burden of proof assumed by the Commissioner in such cases is the same as that ordinarily imposed upon the taxpayer who challenges a proposed deficiency and he must establish his contentions by a preponderance of evidence.

Terminal Railroad Association v. Commissioner, 33 B. T. A. 906.

In the present case the additional tax proposed in the deficiency notice was $4844.10 (R. 12). The March 1, 1913 value for the land in question used by the Commissioner in said deficiency notice was $139,512.15 (R. 14). In his amended answer the Commissioner asked for an increased deficiency in the amount of $17,936.61 based upon the contention that the March 1, 1913 value of the land did not exceed $60,000.00 (R. 17-22). The Tax Court found a March 1, 1913 value of $75,000.00 (R. 36) and determined a deficiency of $15,488.61 (R. 39).

Since, as has been pointed out in this brief, no evidence was presented upon which a finding of a value less than that used by Petitioner could be based, Respondent failed to sustain the burden of proof which he assumed and the Tax Court had no authority to increase the deficiency originally proposed by Respondent. The decision of the Tax Court is in effect a finding that Respondent affirmatively established by competent evidence that the fair market value of the property in question was $75,000.00 on March 1, 1913,

which finding would not be supported by any evidence; or it is an arbitrary assessment of an additional deficiency by the Tax Court, which would also be erroneous because beyond the statutory powers of the Court.

It is respectfully submitted that the decision of the Tax Court for a deficiency in excess of that proposed in the original deficiency notice is erroneous as a matter of law.

VII. THERE WAS NO BASIS UPON WHICH THE TAX COURT COULD DETERMINE ANY DEFICIENCY IN THIS CASE.

In the present case Respondent not only alleged and asked for an increased deficiency but he also expressly repudiated the March 1, 1913 value determined in the deficiency notice and admitted that the value previously determined was erroneous (R. 18). A determination of value in a deficiency notice is ordinarily presumed to be correct until overcome by substantial evidence. But it is doubted that the Commissioner can expressly repudiate such a determination and admit that it is erroneous in order to claim an increased deficiency and still rely upon it to sustain the deficiency originally proposed in the event that he fails to sustain the burden of proof which he voluntarily assumes when he undertakes to establish the lesser value alleged and the additional deficiency claimed.

Where the Commissioner abandons a determination in the deficiency notice and alleges new claims with regard thereto which, if proved, would result in an additional deficiency, it would seem that his position

would be the same as though the abandoned determination had not been included in the deficiency notice but had been affirmatively claimed by the Commissioner in its revised form in his answer. The situation is the same as though the abandoned determination were stricken from the deficiency notice. If the Commissioner fails in his proof and is unable to or does not produce evidence upon which a finding of value can be based and thereby fails to show that any gain was realized by the taxpayer he fails to sustain the burden which he assumed to establish that a deficiency in tax is due from the taxpayer. If no additional income or deficiency in tax is established by the evidence there is nothing before the Tax Court upon which it can base a determination that any deficiency is due.

In *Tex-Penn Oil Co. v. Commissioner* (3 Cir. 1936), 83 F. (2d) 518, affirmed without comment on this point in 300 U. S. 481, the Circuit Court stated (p. 524):

> "The formal notices of deficiency contained in the letter of the commissioner were abandoned and repudiated by the Commissioner himself. The burden thereafter rested upon him *to establish that a capital gain occurred and the amount of it.* * * *" (Italics supplied.)

After further discussion of the facts the Circuit Court again stated (p. 525):

> "The burden in these cases rested upon the commissioner to establish by competent evidence that the taxpayers realized a capital gain and the amount thereof. He has failed to do so.
>
> "A tax with deficiencies and interest of over $9,100,000 seems indefensible on any theory. The

transaction was not taxable and a judgment of no deficiency is to be entered by the Board of Tax Appeals."

In *Hull v. Commissioner* (4 Cir. 1937), 87 F. (2d) 260, 261, the Court stated:

"When the matter came before the Board of Tax Appeals, the respondent filed an amended answer setting up new and different grounds for the determination of a deficiency against the taxpayer from those set out in the original notice of deficiency. As provided by rule 30 of the Rules of Practice of the United States Board of Tax Appeals, under these circumstances, the burden of proof rests upon the Commissioner to prove his contention. The formal notices of deficiency contained in the letters of the Commissioner were abandoned and the burden thereafter rested upon him to establish the allegations of his amended answer. *Tex-Penn Oil Company v. Commissioner* (C.C.A.), 83 F. (2d) 518. See, also, *Helvering v. Taylor,* 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623."

The above decisions indicate that if the Commissioner abandons the determinations in the deficiency notice in order to claim a greater deficiency he also abandons the benefit of the presumption in favor of the correctness of the proposed deficiency and assumes the burden and the risk of establishing by competent evidence not only that an additional deficiency is due but also that any deficiency is due.

In the present case respondent clearly abandoned his determination of value in the deficiency notice and

for the reasons set forth in this brief it is submitted that he failed to prove any value for the property or any gain upon the sale thereof. If, as the above cited authorities seem to hold, there is no longer any presumption that the deficiency notice is correct in so far as this issue is concerned, there is no evidence in the record upon which the Tax Court could determine any gain from the sale of the property in question or any deficiency in tax resulting from such a gain. Since the Commissioner assumed the burden of proof and failed the decision should be in favor of the taxpayer.

In the present case, if the issue with regard to the additional gain from the sale of Petitioner's property had been omitted from the deficiency notice and had been raised by Respondent in his answer, and Respondent failed to prove the facts upon which a gain greater than that reported by Petitioner in its return could be computed, the Tax Court would be required to decide the issue in favor of Petitioner for failure of proof.

Estate of Irving Lee Stone v. Commissioner, 26 B. T. A. 1;

Falck v. Commissioner, 26 B. T. A. 1359;

Iten Biscuit Co. v. Commissioner, 25 B. T. A. 870;

Crider Brothers Commission Co. v. Commissioner, 10 B. T. A. 338.

Petitioner submits that the same rule is applicable here. The determinations in the deficiency notice with regard to the 1913 value of Petitioner's property and the gain realized upon the sale thereof were effectively

stricken therefrom by Respondent's repudiation and abandonment. Respondent having failed in his proof, the Tax Court was without basis or authority to determine what gain if any was realized or to make any change in the gain reported by Petitioner.

In any event Respondent clearly failed to sustain the burden of proof with regard to an increased deficiency and the Tax Court erred in arbitrarily determining a deficiency in excess of that originally proposed in the deficiency notice.

CONCLUSION.

Petitioner respectfully submits:

1. The only evidence in the record of the value of the 11,187 acres of land as of March 1, 1913 is the appraisal and opinion of W. S. Bliss and the testimony of Mr. Comstock.

2. The Tax Court erred as a matter of law in disregarding the appraisal and opinion of W. S. Bliss and the opinion of Mr. Comstock.

3. The finding of the Tax Court that the March 1, 1913 value of the said 11,187 acres of land was $75,000.00 was arbitrary and not supported by any evidence.

4. In abandoning the determination of value in the deficiency notice the Commissioner also abandoned the presumption in favor of the correctness of the deficiency proposed and assumed

the burden of proving not only the additional deficiency claimed but that any deficiency was due.

5. Respondent failed to produce any evidence from which the March 1, 1913 value of the 11,187 acres could be determined and therefore failed to sustain his burden of proof.

6. Since Respondent failed to prove the amount of the gain realized by Petitioner the Tax Court erred as a matter of law in determining any deficiency in tax as the result of the sale of said land.

7. In any event there was no basis for a determination of a deficiency greater than that proposed in the deficiency notice and the Tax Court erred as a matter of law in rendering a decision for an increased deficiency.

Petitioner respectfully submits that the decision of the Tax Court should be reversed with directions to enter a decision for Petitioner.

Dated, San Francisco, California,
July 30, 1943.

Respectfully submitted,
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